No. 14-770

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Section 8772 creates a new rule explicitly limited to a single pending case. It disclaims *any* effect beyond ensuring that one party to that controversy pays its adversaries nearly $2 billion. Respondents cannot identify a *single example* of Congress passing such legislation in the history of the Republic. And with reason: Article I empowers Congress to enact laws. A statute that purports to dictate how the judiciary must resolve a solitary pending case, with no effect beyond requiring one party to pay its adversaries, is not a "law" as that term is traditionally understood.

Section 8772 is an impermissible attempt by Congress to decide a pending case, a power Article III reserves to

the judiciary. The Framers never would have countenanced such an act. For centuries, no Congress did either. Section 8772 is anathema to judicial independence and the rule of law. It cannot be sustained.

I. SECTION 8772 VIOLATES THE SEPARATION OF POWERS BY PURPORTING TO CHANGE THE LAW FOR A SINGLE PENDING CASE

A. Respondents Fail To Identify Any Historical Precedent for §8772

Section 8772 directs the judiciary to resolve a specific proceeding, identified by caption and docket number, according to a completely new rule. It denies that rule *any* effect beyond that one proceeding. Section 8772 thus has no impact on any other parties or cases and no effect after this proceeding's end.

1. Respondents cannot find a single historical antecedent for §8772. None exists—because Congress has never previously tried to enact a statute that so blatantly invades the judicial power. Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). That historical silence is virtually dispositive.

There is a reason respondents can find no precedent for §8772. One of the foundational distinctions between the legislative and judicial powers was that legislatures enact general laws, while courts decide specific cases. Authorities familiar to the Framers—from Locke to *The Federalist*—made that distinction clear. Pet. Br. 22-25.

Respondents ignore those authorities. They offer no framing-era source articulating a contrary conception of the legislative and judicial powers, much less one suggesting that Congress can change the law for a single

pending case to make one party pay the others. Nor do they dispute that legislative interference with specific pending cases was a principal abuse at which the separation of powers was aimed. Pet. Br. 29-30.

Respondents likewise have no answer to the early state cases rejecting their view. Unlike Congress, early state legislatures sometimes attempted intrusions on judicial authority comparable to §8772. But state courts struck down those laws as inconsistent with the separation of powers. Pet. Br. 30-32. Respondents identify no framing-era cases adopting the opposite view.

Respondents assert that *some* of the state cases involved statutes that attempted to reopen final judgments. Resp. Br. 38. Even if the statutes were *also* objectionable on that ground, the courts struck them down because they purported to alter the law *solely for a single pending case*. See, *e.g.*, *Lewis* v. *Webb*, 3 Me. (3 Greenl.) 326, 336 (1825) (invalidating law that extended time to appeal because "it can never be within the bounds of legitimate legislation, to enact a special law * * * in a particular case"); *Baggs's Appeal*, 43 Pa. 512, 516 (1862) (similar). As Justice Iredell observed in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), an act granting new privileges of proceeding "with respect to suits *depending or adjudged* * * * is an exercise of judicial, not of legislative, authority." *Id.* at 398 (emphasis added).

Nor can the early state decisions be dismissed because they involved *state* separation-of-powers principles. Resp. Br. 38. This Court often looks to early state cases for guidance. See, *e.g.*, *Plaut*, 514 U.S. at 223-224. With reason: They reflect framing-era understandings of legislative and judicial power. Respondents are correct that "no decision of this Court" has struck down legislation on that ground. Resp. Br. 36. But that is because, for most

of the Nation's history, Congress never enacted such a law—a "reticence" that speaks volumes. *Plaut*, 514 U.S. at 230.

2. Searching for analogous statutes, respondents scour the annals of private laws, and properly so. If early Congresses thought they could enact legislation limited to a solitary pending case, that is surely where the evidence would be found. But respondents come up dry. The only examples they identify are inapposite for the same reasons as *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and many other authorities they invoke: The statutes were *not limited to a single pending case*, and they concerned *public rights*. See pp. 7-9, *infra*.

The *only* early private laws respondents identify are statutes granting or extending patents and copyrights. Resp. Br. 41 & n.7.[1] But those laws had legal force beyond a single case: They granted patents or copyrights enforceable for a term against the world. The law conferring patent protection to Oliver Evans's flour mill, for example, did not grant a patent solely for one infringement suit; it granted a patent enforceable against *any* infringer in *any* suit. See Act of Jan. 21, 1808, ch. 13, 6 Stat. 70; *Evans* v. *Jordan*, 13 U.S. (9 Cranch) 199 (1815). If Congress had granted a patent valid only for one specified infringement suit, that might start to look more like §8772. But respondents identify no such statute.

The patent and copyright statutes are also inapposite for a second reason: They involved *public rights*. This Court has long recognized that Congress may determine

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[1] See also, *e.g.*, Act of Mar. 3, 1809, ch. 35, 6 Stat. 80; Act of Feb. 7, 1815, ch. 36, 6 Stat. 147; Act of Mar. 3, 1821, ch. 62, 6 Stat. 262; Act of May 24, 1828, ch. 145, 6 Stat. 389.

matters of public rights—typically claims against the government—without regard to Article III. See *Stern* v. *Marshall*, 131 S. Ct. 2594, 2611-2615 (2011). That was one of the reasons the Court sustained the statute in *Wheeling Bridge*: It concerned a "public right secured by acts of congress." 59 U.S. (18 How.) at 431.

Respondents deny that statutes granting patents and copyrights involve public rights. Resp. Br. 41. The law is otherwise. See, *e.g.*, *MCM Portfolio LLC* v. *Hewlett-Packard Co.*, No. 2015-1091, 2015 WL 7755665, at *3-9 (Fed. Cir. Dec. 2, 2015) (holding that "patent rights are public rights"); cf. *Precision Instrument Mfg. Co.* v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 815-816 (1945); 1 William C. Robinson, *The Law of Patents for Useful Inventions* §46, at 69-70 (1890). Respondents urge that such laws cannot concern public rights because they confer "rights to exclude other private persons." Resp. Br. 41. But so does any law conveying public *land* to a private person—which is paradigmatic public rights legislation. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1966 (2015) (Thomas, J., dissenting).

Having reviewed the more than 3100 private laws enacted between 1789 and 1845, we have not found a single example of Congress changing the law solely for one pending case between other parties. See 6 Stat. 1-942 (1789-1845).[2] That should be all but fatal to respondents' position.

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[2] In two instances, Congress consented to reopening judgments *in favor of the government*. See Act of July 2, 1836, ch. 311, 6 Stat. 672; Act of Aug. 26, 1842, ch. 208, 6 Stat. 864. Those laws were clearly public rights legislation. See Pet. Br. 52. They do not imply any broader power to manipulate a single pending case where the government is not a party.

3. Respondents find no refuge in modern statutes either. The law in *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940) (Resp. Br. 41), for example, reinstated *administrative* review of a workers' compensation claim. See Act of Apr. 10, 1936, ch. 198, 49 Stat. 2244. This Court upheld that law because it affected *administrative* rather than judicial proceedings—and thus presented no Article III issue at all. See 309 U.S. at 381 & n.25 (contrasting "statutes affecting judicial judgments rather than administrative orders"). The statute in *Maine Central Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, 835 F.2d 368 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988) (Resp. Br. 43), is even further afield. The court upheld that statute because there *were no pending judicial proceedings*: "We cannot find a legislative encroachment on judicial powers, where the judiciary was powerless to act in the controversy." 835 F.2d at 372.

Respondents also invoke "statutes that settled specific suits * * * against States involving Native American land transfers." Resp. Br. 42. In each case, however, Congress enacted implementing legislation to effectuate *the parties'* settlement agreement. See 25 U.S.C. §1701(d) (reciting that "the parties * * * have executed a Settlement Agreement which requires implementing legislation by the Congress"); *id.* §§1721, 1741(4), 1751(d), 1771(4); H.R. Rep. No. 95-1453, at 5 (1978); H.R. Rep. No. 96-1353, at 11 (1980). There is an obvious difference between a statute that implements a settlement and a statute that changes the law for one case for the sole purpose of making one party lose.

Finally, respondents claim that a handful of modern statutes, although facially general in scope, allegedly targeted one or more pending cases. Resp. Br. 42-43. But §8772 *by its terms* is limited to a single pending case. 22

U.S.C. §8772(c)(1). A statute that *on its face* has no legal effect beyond a single proceeding raises far different separation-of-powers concerns than generally applicable legislation allegedly motivated by pending litigation.

Respondents' search for modern antecedents would shed no significant light on Article III's meaning even if it had been successful. For most of the country's history, Congress never attempted anything remotely like §8772. But the absence of even modern antecedents underscores how far Congress strayed from constitutional norms.

B. Respondents' Reliance on This Court's Precedents Is Misplaced

Bereft of historical support, respondents invoke this Court's cases. Those decisions do not endorse what Congress attempted here.

1. Respondents describe *Wheeling Bridge* as upholding "a statute enacted specifically to resolve a dispute in a single case concerning the legality of a particular bridge." Resp. Br. 20. But that statute was *not* limited to a single case. It declared broadly that the bridge was a "lawful structure[] in [its] present position and elevation" notwithstanding *any* law to the contrary. Act of Aug. 31, 1852, ch. 111, §6, 10 Stat. 110, 112. Congress thus changed the bridge's status for *all* purposes, *all* times, and *all* cases. *Any* action, by *any* party, at *any* point, challenging the bridge on *any* basis was subject to that generally applicable law—even a suit unrelated to the navigation concerns in *Wheeling Bridge*. The statute, moreover, designated the bridge a federal post-road. *Id.* §7, 10 Stat. at 112. That change brought still other generally applicable laws to bear. See, *e.g.*, Act of Mar. 3, 1825, ch. 64, §19, 4 Stat. 102, 107 (prohibiting competing delivery services on post roads). Section 8772—which

specifically limits itself to a single pending controversy—is the polar opposite.

Moreover, as Bank Markazi explained (and respondents never contest), *Wheeling Bridge* relied on the *public rights* nature of the law. Pet. Br. 36-37. "[I]nterference with the free navigation of the river," the Court held, "constituted an obstruction of a public right secured by acts of congress." 59 U.S. (18 How.) at 431. The Court also relied on the *prospective* nature of the relief the statute affected: The earlier decree directing removal of the bridge was "executory, a continuing decree." *Ibid.* The Court contrasted the case with a dispute over money: "If the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress." *Ibid.* Respondents ignore those aspects of the Court's reasoning.[3]

2. Jumping forward a century, respondents invoke *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). They assert that the statute there "applied only to the specific *forests* disputed in [two pending cases], and only for a specific *year*." Resp. Br. 23. But the statute was not limited to two *cases*. As this Court explained, while the statute "made reference to pending cases iden-

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[3] *Pope* v. *United States*, 323 U.S. 1 (1944), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), are similarly inapposite. In *Pope*, Congress prescribed the amount the *federal government* would pay a claimant after a court denied him compensation. See 323 U.S. at 8-10. And in *Sioux Nation*, Congress waived the government's own *res judicata* defense. 448 U.S. at 402-405. Both cases involved paradigmatic public rights authority: The government was spending its own funds and waiving its own defenses, just like any litigant may do. See *Plaut*, 514 U.S. at 230-232. Those cases do not prove that Congress can change the law in a dispute over private rights between other parties.

tified by name and caption number," the reference "served *only to identify the five 'statutory requirements that are the basis for'* those cases." 503 U.S. at 440 (emphasis added). The statute thus altered the law equally for *any suit* challenging the logging based on those five statutory requirements. Pet. Br. 38-39. Respondents may think that distinction immaterial, but this Court found it significant—and thus specifically called it out. 503 U.S. at 440. *Robertson*, moreover, involved claims against the government concerning its management of its own lands—precisely the sort of public rights matter that need not be assigned to Article III courts. Pet. Br. 39.

Most important, *Robertson* expressly declined to reach the question here: whether a statute violates the separation of powers if it "swe[eps] no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[ ]." 503 U.S. at 441. The parties in *Robertson* did not make that argument, so the Court declined to address it. *Ibid.* *Robertson* cannot be precedent for a proposition the Court refused to decide.

3. Respondents claim that *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), "rejected a claim that a statute violated the separation of powers because it directed the result in particular cases." Resp. Br. 23. Not so. *Plaut* involved *generally applicable* legislation. The passage respondents cite consists of three sentences of dicta explaining why *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872)—another case involving *generally applicable* legislation—raised different separation-of-powers concerns. 514 U.S. at 218. That passage does not suggest that Congress can change the law for a single pending case.

Respondents assert that *Plaut* "rejected the view that a statute's breadth bears on whether it infringes the judi-

cial power." Resp. Br. 37. That is incorrect. The "view" *Plaut* rejected was that a statute's breadth could save it if the statute improperly sought to *reopen final judgments*. 514 U.S. at 239. Respondents reason that, "[i]f [a] statute's breadth cannot save it from intruding on the Judiciary's role, neither can the narrowness of a law that does not otherwise infringe the judicial power invalidate it." Resp. Br. 37. That argument defies logic. That a statute's breadth does not save it from *one* separation-of-powers violation (reopening final judgments) does not prove that a statute's scope cannot be relevant to a *different* separation-of-powers violation (invading the judiciary's role of deciding specific cases).

C. Respondents' Remaining Arguments Fail

1. Respondents urge that, because the Bill of Attainder Clause prohibits targeted legislation only when it is punitive, a statute's specificity cannot be relevant to general separation-of-powers principles. The separation of powers, they assert, cannot "invalidate statutes for the *same reasons* as specific, enumerated provisions yet according to *different standards*." Resp. Br. 40.

That is faulty logic. The Bill of Attainder Clause does not invalidate statutes for the "same reasons" as the separation of powers. That Clause prohibits Congress from enacting specific, punitive legislation *whether or not* there is a pending judicial proceeding—indeed, typically absent such a proceeding. See, *e.g.*, *United States* v. *Brown*, 381 U.S. 437 (1965) (invalidating statute prohibiting Communist Party members from serving as union officers or employees). The separation of powers, by contrast, prohibits Congress from picking winners and losers in a *single pending judicial proceeding*. It is that distinct ingredient of a pending case—and the threat to *ju-*

dicial independence such legislation entails—that triggers Article III's application.

To be sure, there is some overlap: A criminal trial before Congress would violate *both* the Bill of Attainder Clause *and* the separation of powers. But that is no reason to truncate Article III. The Constitution sometimes targets specific abuses despite an overlap with broader protections. Compare, *e.g.*, U.S. Const. art. I, § 6 (Speech and Debate Clause), with *id.* amend. I (Free Speech Clause); and *id.* art. VI (Religious Test Clause), with *id.* amend. I (Free Exercise Clause). The Framers singled out bills of attainder because legislative criminal trials were a particularly notorious and egregious abuse. See Pet. Br. 29, 41-42 (collecting sources); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 260 (1868) (bills of attainder "specially obnoxious"). It is inconsistent with the Framers' design to rely on that prohibition to *relax* separation-of-powers limitations that would otherwise apply.

2. Respondents assert that, because Congress can apply general legislation to pending cases, see *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); and Congress can enact special legislation independent of a pending case, see *Paramino*, 309 U.S. at 380; Congress can do both at once and change the law for one pending case. Resp. Br. 44-45. That homespun logic likewise fails.

No principle of law or logic says that, if Congress can do one of two things in isolation, it can do both in combination. Examples disproving that specious reasoning are easy to find. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-498 (2010) (holding that, although Congress can grant for-cause re-

moval protection to inferior officers, and grant for-cause removal protection to the principal officers who supervise inferior officers, it cannot do both at once). Enacting *specific legislation* to change the law solely for a *pending case* offends the separation of powers in a way that those two acts in isolation do not.

Respondents complain that it is "utterly illogical" that Congress's power should "evaporate[] the moment a complaint is filed in federal court." Resp. Br. 44. But the separation of powers secures *judicial* independence, and the threat to that independence arises only once there is a pending case. It is thus neither "illogical" nor even surprising that Congress's authority should depend in part on the existence of a pending case.

While respondents predict a "raft of uncertainties and practical problems," Resp. Br. 45-46, their fears are contrived. Congress managed to avoid enacting legislation like §8772 for most of the Nation's history. So have the many States whose courts adopted this rule nearly two centuries ago. In any event, purported ambiguities around the edges of a rule are no reason to uphold legislation that blatantly violates any plausible account of the separation of powers.

3. Respondents finally urge that, even if the separation of powers prohibits Congress from enacting a law limited to a single case, that prohibition would not apply here because this action involves an agglomeration of lawsuits. Resp. Br. 46-47. That argument is forfeited because it was not raised in the brief in opposition. See Br. in Opp. 19-26; this Court's Rule 15.2. It is also meritless.

The underlying judgments that established liability were entered in 18 different actions (and a 19th added at the last moment). Pet. App. 16a-17a, 18a-19a. But the

"case" to which §8772 applies is *this enforcement proceeding*—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). *This* case began when the Peterson plaintiffs filed a turnover complaint against Citibank, and Citibank responded by interpleading the other judgment creditors as defendants in this one case. Pet. App. 14a-15a; C.A. App. 1349, 1355. The assets were disposed of in a single opinion, by a single judge, who entered a "judgment" of enforcement (singular) in favor of respondents. Pet. App. 13a, 22a, 52a. *This* proceeding involves only a single pending case.

Even if it did not, the same principles would apply. Section 8772 purports to change the law solely for specified judicial proceedings against a single defendant with no other prospective effect; it surgically decides a pending dispute over the payment of money and nothing more. That interference with the judicial function violates the separation of powers whether Congress changes the law for one case between two parties, one case involving 18 plaintiff groups, or 18 enumerated cases each with one plaintiff group. The "law" must have some existence independent of congressionally enumerated judicial proceedings. Section 8772 does not.[4]

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[4] Respondents assert that Bank Markazi did not preserve this argument below. Resp. Br. 36. But this Court granted review despite that assertion, Br. in Opp. 22-23, and properly so. Bank Markazi expressly argued in its opening brief below that §8772 violates the separation of powers by singling out this one case for disfavored treatment. "Section 8772," it explained, "requires that 'the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518' 'shall be subject to execution' by Plaintiffs in this action." C.A.

II. SECTION 8772 IS UNCONSTITUTIONAL BECAUSE IT EFFECTIVELY DICTATES THE OUTCOME OF A SINGLE PENDING CASE

Section 8772 also intrudes on judicial authority in a second respect: It purports to *dictate the outcome* of a single pending case.

A. Congress May Not Direct the Outcome of a Specific Case

This Court made clear in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress may not dictate the outcome of pending judicial proceedings. "[T]he legislature," the Court held, may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. Such statutes "pass[] the limit which separates the legislative from the judicial power." *Id.* at 147.

The court of appeals assumed that §8772 effectively dictated the outcome of this case, but held that Congress

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Br. 50 (emphasis omitted). "Congress's overt attempt in §8772 to determine the outcome of this case," Bank Markazi urged, "plainly 'usurp[s] the adjudicative function assigned to the federal courts under Article III.'" *Ibid.*; see also *id.* at 49 ("'Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases.'"). Bank Markazi made the same point in reply, specifically quoting *Robertson*'s reference to a law that "'swept no more broadly, or little more broadly, than the range of applications at issue' in a particular case." C.A. Reply 19 n.8. That was more than sufficient to preserve the issue. Besides, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Bank Markazi presented its separation-of-powers *claim* below. Whether Congress violated the separation of powers by dictating the result in a single case, or by changing the law in that case to help its preferred litigant prevail, are at most different *arguments* supporting that claim.

can enact such legislation so long as it purports to amend applicable law. Pet. App. 7a-10a. Respondents barely defend that theory. As Bank Markazi explained, the theory rests on a misreading of *Robertson*, which expressly declined to reach that issue. Pet. Br. 48-49.[5]

Even respondents' amici reject that theory: The statute in *Klein* itself, they observe, unquestionably purported to amend the law. See Constitutional Law & Federal Courts Scholars Br. 20-23 (citing Act of July 12, 1870, ch. 251, 16 Stat. 230, 235). The theory also reduces Article III's protections to an empty formalism, allowing Congress to direct judicial outcomes as it sees fit so long as it declares "we hereby amend the law."

Respondents accordingly take a different tack, asserting that *Klein* prohibits Congress from directing the outcome only for matters on which Congress lacks authority to legislate—such as the effect of a presidential pardon. Resp. Br. 29-30. But that theory is equally wrong. *Klein* made clear that the statute's infringement on the pardon power was an *independent* infirmity: "The rule prescribed is *also* liable to just exception as impairing the effect of a pardon * * * " 80 U.S. (13 Wall.) at 147 (emphasis added). Respondents' view, moreover, would render *Klein* meaningless. A separation-of-powers principle

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[5] Respondents' assertion that Bank Markazi argued the opposite below (Resp. Br. 31) is forfeited and wrong. Respondents never made that argument in their brief in opposition. See Br. in Opp. 22-23; this Court's Rule 15.2. And Bank Markazi stated only that, under existing Second Circuit law, "the key inquiry * * * is whether the statute 'usurp[s] the adjudicative function assigned to the federal courts under Article III' or instead merely 'chang[es] the law applicable to pending cases.'" C.A. Br. 48-49. That statement did not concede that *any* statute that purports to change the law is constitutional under *Klein*.

that condemns statutes only when Congress also violates some *other* constitutional limitation serves no purpose.

This Court need not mark the outer bounds of *Klein* in this case. The separation of powers prohibits Congress from effectively dictating the outcome of a single pending case between other parties. A statute that directs a court how to decide such a case simply is not a "law" as that term is traditionally understood. The Court need hold no more to reverse the judgment below.

B. Section 8772 Left No Meaningful Determinations to the Courts

Despite §8772's avowed purpose of "ensur[ing] that Iran is held accountable for paying the judgments," 22 U.S.C. §8772(a)(2), respondents deny that the statute effectively dictated the outcome here. They point to a number of required "findings" that the assets were blocked, that they were held in the United States for a foreign securities intermediary, and that they were restrained by court order. Resp. Br. 50-52. But respondents do not claim that any of those facts was *disputed*, or even *capable of dispute*. Indeed, on the key issue of whether an entity other than Bank Markazi had a beneficial interest in the assets, the statute *specifically excluded* a "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran"—a provision clearly designed to exclude Clearstream and UBAE, the only other possible stakeholders. 22 U.S.C. §8772(a)(2)(A). Congress does not reserve meaningful authority to the courts by having them decide only collateral, uncontested issues.

The only relevant issue even arguably contested below was whether Clearstream had a *constitutionally protected* interest in the assets, which could bar execution under 22 U.S.C. §8772(a)(2)(B). See Resp. Br. 51-52; Pet. App.

116a-119a; C.A. App. 6011-6014. But that provision was not a genuine reservation of judicial authority either. It was wholly superfluous: A court would have to consider a constitutional claim *even if Congress had not reserved the issue*. If Congress cannot tell a court to award Jones $50,000 in his suit against Smith, Congress also cannot tell the court to award Jones $50,000 "unless constitutionally prohibited." But that is what Congress did here.

III. BANK MARKAZI'S SOVEREIGN STATUS DOES NOT ALTER THE SEPARATION-OF-POWERS ANALYSIS

Respondents and the United States offer various theories why Bank Markazi's sovereign status should change the result. But the court below never considered those arguments—no court has. The Second Circuit's sole rationale was that Congress has free rein to dictate the outcome in a single pending case so long as it amends the law. Pet. App. 7a-10a. This Court need not address Bank Markazi's sovereign status to reject that mistaken view. In any event, these arguments likewise fail.

A. Section 8772 Is Not Public Rights Legislation

Respondents argue that § 8772 is public rights legislation exempt from Article III. Because "[a]cts of state-sponsored terrorism are public acts," they contend, "Congress's decision to make available to victims of such acts new means of satisfying judgments against the foreign state implicates 'public rights' no less than if the United States had elected to pay the judgment itself." Resp. Br. 41-42.

Not so. As this Court explained in *Stern*, the public rights doctrine traditionally applied only to disputes with the *federal government*—the government's plenary power to expend its *own* funds, to manage its *own* property, and to control its *own* amenability to suit includes the

power to dispense with Article III's requirements for claims concerning those functions. 131 S. Ct. at 2611-2615. There is thus a rather obvious difference between Congress "pay[ing] the judgment itself" and Congress forcing *someone else* to pay. Resp. Br. 41-42. That Congress can enact a private law paying Jones $10,000 out of general treasury funds does not prove that Congress can direct a court to order *Smith* to pay that amount.

Indeed, only weeks ago, Congress appropriated over *$1 billion* to compensate terrorism victims, specifically including the plaintiffs here. See Consolidated Appropriations Act, 2016, H.R. 2029, div. O, § 404(e)(2)(B)(iii), (e)(5) (enacted Dec. 18, 2015); see also *id.* § 404(f)(1) (authorizing up to 25% of the funds to be used for attorney's fees). Congress did not have to violate the separation of powers to accomplish that result.

B. The Political Branches' Foreign Affairs Powers Do Not Justify § 8772's Intrusion into Judicial Authority

The United States takes a different approach, asserting vast authority to direct the outcome of specific cases against foreign sovereigns under its foreign relations powers. Those arguments fail.

1. The government first appeals to the Executive Branch's former practice of "determin[ing] the immunity of foreign states * * * on a case-by-case basis." U.S. Br. 21. But as the government admits, § 8772 does more than revoke immunity. It also displaces state property law. *Id.* at 30. And it displaces substantive federal law regarding juridical status. Pet. Br. 27-28. The Executive's former authority to determine *immunity* case by case does not prove that Congress can not only lift immunity but also change *substantive law* so that one party loses on the merits.

2. The government also invokes the claims-settlement authority upheld in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). U.S. Br. 23-25. But that authority is the power to "renounce or extinguish claims *of United States nationals* against foreign governments" to effectuate a "treaty" or "executive agreement" between the sovereigns. *Dames & Moore*, 453 U.S. at 679 (emphasis added). This Court has emphasized the "narrow set of circumstances" where that power applies. *Medellín* v. *Texas*, 552 U.S. 491, 531 (2008); see also *Dames & Moore*, 453 U.S. at 660-661. That narrow power is irrelevant where there is no international agreement to effectuate and Congress is simply directing a court to rule against a foreign sovereign despite otherwise applicable law.

3. The government finally invokes the President's blocking authority under statutes like the International Emergency Economic Powers Act, 50 U.S.C. §§1701 *et seq.* U.S. Br. 25-27. That argument is groundless—and only exacerbates separation-of-powers concerns.

The government cites no examples of blocking statutes that authorized confiscation of sovereign assets only in a single pending judicial proceeding. Traditional blocking statutes like the IEEPA are *generally applicable*. See 50 U.S.C. §§1701 *et seq.* Congress's authority to enact such general statutes does not mean Congress can legislate the outcome of a single pending case.[6]

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[6] The government cites the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §2002, 114 Stat. 1464, 1541. U.S. Br. 27. But that statute paid Iranian judgments out of *U.S. government funds*, and Cuban assets were already subject to confiscation. See Pub. L. No. 106-386, §2002(b)(1)-(2), 114 Stat. at 1543; Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 15-18 (Aug. 8, 2008).

The government does not contend that any current blocking statute permits confiscation and redistribution of the assets here. The IEEPA, for example, allows confiscation only "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals." 50 U.S.C. §1702(a)(1)(C). Section 8772 thus seeks to compel a judicial result that the President could not effect.

Besides, whatever the President's authority, Congress cannot commandeer the judiciary to reach a particular result in one pending case. Even if Congress could authorize the President to confiscate and redistribute these assets, Congress cannot manipulate the law in a single case to require the *courts* to decree that result instead. Dragooning the judicial process in that manner is antithetical to the judicial independence and rule of law that the separation of powers protects.

IV. THIS COURT SHOULD NOT ADDRESS TRIA

Respondents urge the Court not to decide the question presented and to hold that TRIA permits execution instead. Resp. Br. 53-57. The court of appeals, however, declined to reach that issue. See Pet. App. 5a ("We need not resolve this dispute under the TRIA * * * "). This Court is "'a court of review, not of first view.'" *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). Any dispute over TRIA should be left for the court of appeals on remand.

Respondents' argument is also incorrect. TRIA applies only to "blocked assets *of* th[e] terrorist party." 28 U.S.C. §1610 note §201(a) (emphasis added). That language requires *ownership*. See *Heiser* v. *Islamic Repub-*

lic of Iran, 735 F.3d 934, 937-941 (D.C. Cir. 2013).[7] Under U.C.C. Article 8, Bank Markazi does not *own* the assets at issue. Instead, Clearstream's security entitlements at Citibank in New York are *Clearstream's* property. Bank Markazi's only property is its security entitlements against *its* securities intermediary, UBAE, in Europe. See Pet. Br. 4-5; U.C.C. §8-112(c) & cmt. 3.[8]

Respondents' assertion that their construction is "manifestly correct" (Resp. Br. 53) is belied by their own conduct. Respondents would not have gone to the trouble of procuring special legislation directing the outcome of this case if their position were so clear. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013 (statute designed to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors"). Respondents' own amici urge that §8772 was necessary *precisely because* courts construed TRIA narrowly. See Nat'l Security Law Professors Br. 31 (complaining that

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[7] See also U.S. Br. in *Calderon-Cardona* v. *Bank of N.Y. Mellon*, No. 12-75, ECF No. 210, at 16-24 (2d Cir. filed Sept. 21, 2012); U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, ECF No. 82, at 14-17 (9th Cir. filed Oct. 23, 2015).

[8] Respondents point to U.C.C. §8-503. Resp. Br. 55-56. But that provision addresses only ownership as between the intermediary and its customer: It means that Clearstream rather than Citibank owns the assets in New York, while Bank Markazi rather than UBAE owns the assets in Italy. See U.C.C. §8-503(a) & cmts. 1-2. Respondents also point to arguments Bank Markazi made early in the proceedings below, outside the context of U.C.C. Article 8. Resp. Br. 54. But a party's *legal arguments* are not binding judicial admissions. See *N.Y. State Nat'l Org. for Women* v. *Terry*, 159 F.3d 86, 97 n.7 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999); 30B Michael H. Graham, *Federal Practice and Procedure* §7026, at 325-326 (2011). In any event, the case-specific nature of this dispute underscores why it should be left for remand.

Heiser "places the overwhelming majority of blocked assets beyond the reach of United States victims"). Respondents' TRIA arguments are wrong—and certainly not so clear-cut that this Court should reach out to decide them in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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